

No. 15981

UNITED STATES
COURT OF APPEALS
for the Ninth Circuit

WALTER F. FREEMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

FILED

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APPELLANT'S OPENING BRIEF

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1 from the United States District Court for the
Southern District of California
Southern Division.

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INDEX

	PAGE
Jurisdiction	1
Statement of the Case	3
Specification of Error	7
Argument	
I Introduction	8
II Method of Computation of Pay	9
III "Resulting from Active Service"	14
Conclusion	20

TABLE OF CASES CITED

PAGE

Neill, William L. v. Commissioner of Internal Revenue, 17 TC 1015, Dec. 18, 672	15
Prince, Guyla S. v. United States 112 Ct. Clms. 612, 119 Fed. Supp. 421	12,13

TABLE OF STATUTES AND RULINGS

28 USCA Section 1294	2
28 USCA Section 1346	1
34 USCA Section 854 b Act of June 25, 1938, c. 690, Title II, Sec. 203, 52 Stat. 1178, amended Aug. 10, 1956, c. 1041, Sec. 25, 70A Stat. 631	9,12
34 USCA Section 854 e Act of June 25, 1938, c. 690, Title II, Sec. 206, 52 Stat. 1179, amended Apr. 25, 1940, c. 153, 54 Stat. 162	9,12
34 USCA Section 854 g Act of June 25, 1938, c. 690, Title II, Sec. 208, as added Aug. 10, 1946, c. 952, Sec. 3, 60 Stat. 994	9
37 USCA Section 272(a) Act of Oct. 12, 1949, c. 681, Title IV, Sec. 402(a), 63 Stat. 802, 817	16,18

TABLE OF STATUTES AND RULINGS (CONT'D)

PAGE

37 USCA Section 281, Act of Oct. 12, 1949, c.681, Title IV, Sec. 411, 63 Stat. 823	10,1
37 USCA Section 311, Act of Oct. 12, 1949, c. 681, Title V, Sec. 511, 63 Stat. 829; Act of May 19, 1952, c. 310, Sec. 4, 66 Stat. 80	11,1
Section 22(b)(5) of the Internal Revenue Code of 1939	5,1
Section 113 of the Revenue Act of 1942	5,1
I.T. 3641, 1944 Cumulative Bulletin 70, of the Treasury Department	18

JURISDICTION

This is an appeal from a Complaint for refund of income tax erroneously withheld by the United States Navy in January 1952 (TR pages 3-12). The United States filed its answer and counterclaimed for the sum of \$256.90 plus interest for unpaid income tax assessed for the year 1952 by the Commissioner of Internal Revenue (TR pages 12-19). The plaintiff filed an answer to the counterclaim denying that said sum was due and owing (TR pages 19-20).

This action was brought by the plaintiff under paragraph (a)(1) of Section 1346 of USCA Title 28 after filing a Claim for Refund and having said Claim for Refund denied (TR page 21).

The United States District Court for the Southern District of California, Southern Division, entered its judgment against the plaintiff on the complaint and for the

United States on its counterclaim in the amount of \$332.57, together with costs in the sum of \$20.00, on February 13, 1958 (TR pages 51-58).

Plaintiff and appellant thereupon filed Notice of Appeal on March 10, 1958 (TR page 59), and thereafter perfected his appeal to this Court under the provisions of USCA Title 28 Section 1294 and Rules on Appeal.

Plaintiff and Appellant had exhausted all of his administrative remedies prior to filing this action. See Pretrial Stipulation and Order (TR 21,25) and Finding XVII of Findings of Fact, Conclusions of Law and Judgment (TR 51,56).

STATEMENT OF THE CASE

The appellant, Walter F. Freeman, enlisted in the United States Navy on May 6, 1918, and served continuously thereafter as an enlisted man in the United States Navy to June 26, 1939. On that date, appellant was transferred to the Fleet Reserve and released from active service (Pl's Exhibit 7, TR 41). On September 11, 1939, appellant was recalled to active duty at San Diego, California. At the time of recall to active duty, appellant was examined and found to be physically fit for all duty (Pl's Exhibit 8, TR 43). Appellant was on active duty from September 11, 1939, to February 18, 1943. On January 5, 1943, plaintiff was examined and found to have the following defects:

1. Arterio Sclerosis general 210.

2. Vision 10/20 left, 16/20 right, corrected to 20/20 in each eye by glasses.
3. Varicose veins, legs and feet, No. 249.

Said physical examination further recommended that the plaintiff was "not fit to perform active duty at sea or on foreign service" and "not physically qualified for any duty" (Finding of Fact IX, TR 53). On January 21, 1943, the Chief of the Bureau of Medicine and Surgery approved the examination and recommendation and further recommended that plaintiff be released from active duty and placed on the retired list (Finding of Fact IX, TR 53. On February 6, 1943, the Chief of Naval Personnel by letter order directed that plaintiff be released from active duty and placed on the retired list on the first day of the month following his release from active

duty under the authority of the Naval Reserve Act of 1938 (Pl's Exhibit 2, TR 27). On February 18, 1943, plaintiff was released from active duty (Pl's Exhibit 9, TR 45), and on March 1, 1943, plaintiff was placed on the retired list (Pl's Exhibit 10, TR 47).

Section 22(b)(5) of the Internal Revenue Code, as amended by Section 113 of the Revenue Act of 1942, states that retirement pay is exempt from income tax if said retirement pay is received "for personal injuries or sickness resulting from active service in the armed forces of any country."

From time of plaintiff's retirement until the year 1952, plaintiff reported his retirement pay as exempt from income tax.

In March, 1953, plaintiff filed his 1952 income tax return on Form 1040a,

showing thereon his retirement pay of \$2,064.56 and income tax withheld of \$22.10 (Pl's Exhibit 12, TR 50). He thereafter duly and in accordance with law filed a Claim for Refund for \$22.10 which had been withheld from his retired pay for the month of January, 1952 (Finding of Fact IV, TR 52). This claim for refund was denied and this action was brought for the refund of said sum of \$22.10 withheld.

SPECIFICATION OF ERROR

That the District Court erroneously decided that no part of the retirement pay received by plaintiff and appellant from the United States Navy during the year 1952 was received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the United States Navy and therefore not exempt from income tax, whereas in fact all of such retirement pay so received by plaintiff and appellant was so received and all of such retirement pay received by plaintiff and appellant from the United States Navy was exempt from income tax.

ARGUMENT

I

Appellant agrees with all of the Findings of Fact found by the District Court except Finding of Fact XVIII and any which might be incorporated as a Finding of Fact under Finding of Fact XIX and further disagrees with the Conclusions of Law and the Judgment resulting from Finding of Fact XVIII.

At the trial, all of the evidence presented was documentary and is now before this Court.

Finding of Fact XVIII that "no part of the retirement pay received by the plaintiff from the United States Navy during the year 1952 was received as a pension, annuity or similar allowance for personal injuries or sickness resulting from active service in the United States Navy" is a conclusion arrived at by the

District Court from the documentary evidence presented to that Court and which is now before this Court.

II

It is true that the amount of appellant's retirement pay is computed on length of service with no factor for disability. However, those portions of the Naval Reserve Act of 1938 under which appellant was transferred to the Fleet Reserve (Act of June 25, 1938, c. 690, Title II, Sec. 203, 52 Stat. 1178, amended Aug. 10, 1956, c. 1041, Sec. 25, 70A Stat. 631; 34 USCA Sec. 854b) and under which appellant was retired (Act of June 25, 1938, c. 690, Title II, Sec. 206, 52 Stat. 1179, as amended Apr. 25, 1940, c. 153, 54 Stat. 162; 34 USCA Sec. 854e; and Act of June 25, 1938, c. 690, Title II, Sec. 208 as added Aug. 10, 1946, c. 952, Sec. 3, 60 Stat. 994; USCA Sec. 854g) make no

provision for retirement based upon any disability factor. Under the Fleet Reserve Act of 1938, Fleet Reserve pay is one-third, one-half, or three-quarters of active duty pay, plus authorized allowances, depending upon the number of years of service, namely, sixteen years, twenty years, and thirty years, respectively. When found not physically qualified, enlisted men in the Fleet Reserve are transferred to the retired list of the Regular Navy with the pay they are then receiving in the Fleet Reserve.

The Career Compensation Act of 1949 (Oct. 12, 1949, c. 681, Title IV, Sec. 411, 63 Stat. 823; 37 USCA Sec. 281) states in part:

".....any member or former member of the uniformed services heretofore retired by reason of physical disability

and now receiving or entitled to receive retirement or retirement pay..... may elect..... (B) to receive retired pay or retirement pay computed by one of the two methods contained in section 311 of this title.....".

Section 311 (Oct. 12, 1949, c. 681, Title V, Sec. 511, 63 Stat. 829; May 19, 1952, c. 310 Sec. 4, 66 Stat. 80) states in part:

"On and after October 1, 1949 (1) members of the uniformed services heretofore retired for other than physical disability..... shall be entitled to receive retired pay, retirement pay, retainer pay or equivalent pay in the amount whichever is greater, computed by one of the following methods:

(a) The monthly retired pay, retainer pay or equivalent pay in the amount authorized for such members and former members by provisions of law in effect on the day immediately preceding October 12, 1949."

Under this provision of the law, appellant elected to continue to receive his retirement pay as computed under the Naval Reserve Act of 1938, as amended. Thus appellant's pay was computed solely on years of service.

Regardless of whether appellant was or was not retired for physical disability "resulting from service in the U.S.Navy," appellant's retirement pay would be the same under the Naval Reserve Act of 1938 and under the election made by appellant under the Career Compensation Act of 1949.

In the case of Guyla S. Prince v. United States (112 Ct. Clms. 612, 119 Fed. Supp. 421), the U.S. Court of Claims found

that a colonel who was retired because of age and recalled to active duty on the day following retirement and then three months later was found by a Retiring Board to be physically incapacitated for active service based on disabilities incurred in line of duty prior to his original retirement, should be found to have been retired for physical disability and found that his retirement pay was exempt from income tax, even though the retirement pay in either case would be based on years of service.

This case of Prince v. United States (supra) is directly on the point that even though the retirement pay is computed on years of service, without any disability factor involved, the retirement pay is still exempt if the retirement was for disability resulting from active service.

There is no question but that appellant was retired for physical disability. The record is clear that he was retired as a result of the physical examination of January 5, 1943, as set forth above under the Statement of Facts.

III

The only question is whether or not appellant was retired for physical disability resulting from active service in the United States Navy.

Sec. 22(b)(5) of the Internal Revenue Code of 1939, as amended by Section 113 of the Revenue Act of 1942, provides in pertinent part:

"The following items shall not be included in gross income and shall be exempt from taxation under this chapter; 5.amounts received as a pension, annuity or similar allowance for personal

injuries or sickness resulting from active service in the armed forces of any country."

In the case of William L. Neill v. Commissioner of Internal Revenue (17 TC 1015, Dec. 18, 672), the Tax Court stated that "the mere fact that he was incapacitated at the time of retirement is not sufficient to bring the exemption into play if he was actually retired for length of service rather than for disability incurred in line of duty (citing cases). It therefore becomes pertinent to inquire into the basis upon which petitioner was retired." The court then inquired into the basis on which the petitioner was retired and found that he was retired for physical disability and that his retirement pay was exempt under Section 22(b)(5) of the Code.

Under this provision of the law as interpreted by the Tax Court, if appellant

was retired for, and receives his retirement pay for, personal injuries or sickness resulting from active service in the United States Navy, such retirement pay would be exempt from income tax and appellant is entitled to the refund.

Section 402(a) of the Career Compensation Act of 1949 (63 Stat. 802, 817; 37 USCA 272(a)) states:

"That any disability shown to have been incurred in line of duty during a period of active service in time of war or national emergency shall be considered to be the proximate result of the performance of active duty."

The record shows that appellant was found "fit for all duty" on September 11, 1939 (Plaintiff's Exhibit No. 8, TR 43, 44). The Medical Record of Appellant (Plaintiff's Exhibit No. 1) shows that

the disabilities for which appellant was retired were "in line of duty." It is therefore obvious that these disabilities were incurred during the period from September 11, 1939, to the date of the physical examination which found appellant "not fit for any duty," on January 5, 1943.

A National Emergency was declared by the President of the United States on September 16, 1940, World War II was commenced on December 7, 1941, and active hostilities terminated in 1945.

Appellant was retired March 1, 1943, which was during a time of war, active warfare having commenced in 1941 and terminated in 1945.

It is therefore obvious that appellant's disabilities were "incurred in line of duty during a period of active service in time of war or national

emergency." Such disabilities, therefore, must be "considered to be the proximate result of the performance of active duty" under the presumption established by Section 402(a) of the Career Compensation Act of 1949 (supra).

The Treasury Department in I.T. 3641, 1944 Cumulative Bulletins 70, ruled that the retirement pay of officers of the Regular Army who have been retired under Section 1251 of the Revised Statutes (section 933, Title 10, USCA) for personal injuries or sickness resulting from active service in the United States Army, are not taxable for 1942 and subsequent years. There is no reason why retirement from the United States Navy should be any different as to taxability of retirement pay, and enlisted men of the armed services should receive the same treatment for their retirement pay as is given to officers of

the services. Therefore, it would appear only reasonable that this ruling should apply to applicant's retirement pay received for the year 1952.

CONCLUSION

We have shown above that appellant was retired for physical disabilities and also that under the law such disabilities must be considered to be the result of active duty in the United States Navy. This complies in all respects with the requirements of Section 22(b)(5) of the Internal Revenue Code of 1939, as amended, to make such retirement pay exempt from income tax. The District Court therefore incorrectly found that such pay was not exempt and its judgment should be reversed and a Finding of Fact entered for the plaintiff that plaintiff's retirement pay is exempt from income tax and a Judgment for plaintiff be entered in the sum of \$22.10 and the defendant's cross-complaint be dismissed.

CRITTENDEN & GIBBS,
By PHILIP CRITTENDEN,
Attorney for Appellant.

APPENDIX

EXHIBITS

All exhibits were stipulated to be admitted in the Pretrial Stipulation and Order (Transcript of Record, page 21, 25) and were admitted in accordance therewith by order of the Court (TR 27).

Charles K. Rice, Assistant Attorney General
Lee A. Jackson, Chief, Appellate Section,
Tax Division

Department of Justice
Washington 25, D.C.

that affiant sealed said envelope and deposited the same in the U.S. Post Office at San Diego, California, on the _____ day of July, 1958, with postage thereon fully prepaid.

Subscribed and sworn to before me
this _____ day of July, 1958.

Notary Public in and for said County
and State.